

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ELIZABETH DE COSTER *et al.*, on behalf of
themselves and all others similarly situated,

CASE NO. 2:21-cv-00693-JHC

Plaintiffs,

ORDER

V.

AMAZON.COM, INC., a Delaware corporation,

Defendant.

DEBORAH FRAME-WILSON, *et al.*, on behalf of themselves and all others similarly situated,

CASE NO. 2:20-cv-00424-JHC

Plaintiffs,

V.

AMAZON.COM, INC., a Delaware corporation.

Defendant

CHRISTOPHER BROWN, *et al.*, on behalf of
themselves and all others similarly situated,

CASE NO. 2:22-cv-00965-JHC

Plaintiffs.

V.

AMAZON.COM, INC., a Delaware corporation,

Defendant

I

INTRODUCTION

This matter comes before the Court on Amazon’s Motion to Claw Back Privileged Material and Strike References Thereto from Plaintiffs’ Class Certification Motion. Case No. 21-693, Dkt. # 296; Case No. 20-424, Dkt. # 287; Case No. 22-965, Dkt. # 165. The Court has reviewed the materials filed in support of and in opposition to the motion, pertinent portions of the record, and the applicable law. The Court finds oral argument unnecessary. For the reasons below, the Court DENIES the motion.

III

BACKGROUND

Plaintiffs brought antitrust class action lawsuits against Amazon claiming various violations of the Sherman Act. Case No. 21-693, Dkt. # 126 (redacted); Case No. 20-424, Dkt. # 165 (redacted); Case No. 22-965, Dkt. # 100. On February 20, 2025, Plaintiffs in *Frame-Wilson* filed their Motion for Class Certification. Case No. 20-424, Dkt. # 266 (sealed). Amazon says that within a week of receiving Plaintiffs' motion, it emailed Plaintiffs to claw back Exhibit 68 (CAAGLit-AMZ_10780239), Exhibit 69 (CAAGLit-AMZ_03029869), and Exhibit 94 (CAAGLit-AMZ_10631781).¹ Amazon asked Plaintiffs to "destroy all copies of these documents, delete them from any and all litigation support or other databases in [their] possession, and expunge them from any work product reflecting the contents of the documents."

¹ Amazon also clawed back all copies of Exhibit 68 that had been produced to Plaintiffs: CAAGLit-AMZ_03033686, CAAGLit-AMZ_03034000, CAAGLit-AMZ_03034028, CAAGLit-AMZ_106377333, CAAGLit-AMZ_10695061, and CAAGLit-AMZ_10804172. *See* Case No. 21-693, Dkt. # 298 at 3 ¶ 11; Case No. 20-424, Dkt. # 289 at 3 ¶ 11; Case No. 22-965, Dkt. # 167 at 3 ¶ 11.

Also, Robert D. Keeling's declaration asserts that Amazon now seeks to claw back three documents like Exhibit 94 that "were incorrectly produced with inconsistent redactions." Case No. 21-693, Dkt. # 298 at 3 ¶ 9; Case No. 20-424, Dkt. # 289 at 3¶ 9; Case No. 22-965, Dkt. # 167 at 3 ¶ 9. Amazon provides no other information about these documents, and this Order does not address them.

1 Case No. 21-693, Dkt. # 296 at 8; Case No. 20-424, Dkt. # 287 at 8; Case No. 22-965, Dkt. # 165
2 at 8 (internal quotation omitted). Amazon also requested that Plaintiffs “remove any reference to
3 the above documents from their class certification papers and re-file a new version that contains
4 no reference to the above three documents.” Case No. 21-693, Dkt. # 296 at 8; Case No. 20-424,
5 Dkt. # 287 at 8; Case No. 22-965, Dkt. # 165 at 8 (internal quotation omitted). Plaintiffs
6 responded that they believed the company had waived privilege over these documents. Case
7 No. 21-693, Dkt. # 296 at 9; Case No. 20-424, Dkt. # 287 at 9; Case No. 22-965, Dkt. # 165 at 9.
8 The parties met and conferred and did not resolve the issue. Case No. 21-693, Dkt. # 296 at 9;
9 Case No. 20-424, Dkt. # 287 at 9; Case No. 22-965, Dkt. # 165 at 9.

10 III

11 DISCUSSION

12 Generally, a party waives privilege with respect to a document if they produce it. *United*
13 *States v. Sanmina Corp.*, 968 F.3d 1107, 1116–17 (9th Cir. 2020). Federal Rule of Evidence
14 502(b) provides that disclosure does not waive privilege when it is (1) inadvertent; (2) the
15 privilege holder “took reasonable steps to prevent disclosure;” and (3) the privilege holder took
16 prompt, reasonable steps to correct the error. *See* Fed. R. Evid. 502(b)(1) – (3). And Federal
17 Rule of Evidence 502(d) provides that a federal court may order that the privilege is not waived
18 by disclosure. “[W]aiver of any privilege [i]s the threshold issue” when determining whether a
19 clawed back document is privileged. *In re Qualcomm Litig.*, No. 3:17-CV-108-GPC-MDD,
20 2018 WL 6617294, at *4 (S.D. Cal. Dec. 18, 2018). The party asserting privilege bears the
21 burden of proving that privilege is not waived. *Id.*

22 Amazon contends that the Electronically Stored Information (ESI) Protocol governs this
23 dispute, and that the parties did not intend to override the protections of Federal Rule of
24 Evidence 502(d). Case No. 21-693, Dkt. # 296 at 9–10; Case No. 20-424, Dkt. # 287 at 9–10;

1 Case No. 22-965, Dkt. # 165 at 9–10. But the company says that even if the parties’ Protective
 2 Order (instead of the ESI protocol) governs this dispute, the Court is compelled to reach the
 3 same result. Case No. 21-693, Dkt. # 296 at 9–10; Case No. 20-424, Dkt. # 287 at 9–10; Case
 4 No. 22-965, Dkt. # 165 at 9–10. In the alternative, Amazon argues that even if Rule 502(d) does
 5 not control the treatment of these documents, Amazon’s handling of the documents satisfies the
 6 Rule 502(b) requirements. Case No. 21-693, Dkt. # 296 at 12; Case No. 20-424, Dkt. # 287 at
 7 12; Case No. 22-965, Dkt. # 165 at 12.²

8 A. Whether the ESI Protocol or the Protective Order Applies to the Disputed Documents

9 Amazon contends that the parties’ ESI Protocol contains a Rule 502(d) provision that
 10 expressly protects against waiver of privilege if a party produces privileged information during
 11 discovery. Case No. 21-693, Dkt. # 296 at 10; Case No. 20-424, Dkt. # 287 at 10; Case No. 22-
 12 965, Dkt. # 165 at 10. They say that the ESI Protocol governs “the exchange of electronically-
 13 stored information between the parties” while the Protective Order “generally concern the
 14 confidentiality of information produced by parties and non-parties.” Case No. 21-693, Dkt. #
 15 315 at 3–4; Case No. 20-424, Dkt. # 304 at 3–4; Case No. 22-965, Dkt. # 180 at 3–4.

16 Plaintiffs respond that Amazon previously told the Court that the Protective Order, not
 17 the ESI protocol, controls the waiver analysis. Case No. 21-693, Dkt. # 311 (sealed) at 9; Case
 18 No. 20-424, Dkt. # 300 (sealed) at 9; Case No. 22-965, Dkt. # 176 (sealed) at 9 (citing Case No.
 19 21-693, Dkt. # 292 (sealed) at 7; Case No. 20-424, Dkt. # 284 (sealed) at 7; Case No. 22-965,

20 ² The central issue before the Court is whether Amazon has waived privilege over the disputed
 21 documents. The parties briefly discuss whether these documents are privileged. Case No. 21-693, Dkt. #
 22 296 at 7; Case No. 20-424, Dkt. # 287 at 7; Case No. 22-965, Dkt. # 165 at 7 (“[T]he details of the
 23 documents are not material to this Motion because Plaintiffs have not disputed that they contain
 24 privileged information...”). *See also* Case No. 21-693, Dkt. # 311 (sealed) at 14 n.5; Case No. 20-424,
 Dkt. # 300 (sealed) at 14 n.5; Case No. 22-965, Dkt. # 176 (sealed) at 14 n.5 (“Contrary to Amazon’s
 representation, Plaintiffs have consistently contested Amazon’s privilege designation.”). But since
 Amazon’s motion centers on whether the company is procedurally entitled to claw back these documents,
 the Court assumes, without deciding, that these documents are privileged.

1 Dkt. # 162 (sealed) at 7).³ They also say that, based on the language of the Protective Order, the
 2 ESI Protocol only allows for the return of documents produced without a prior privilege review.
 3 Case No. 21-693, Dkt. # 311 (sealed) at 10; Case No. 20-424, Dkt. # 300 (sealed) at 10; Case No.
 4 22-965, Dkt. # 176 (sealed) at 10.

5 On February 28, 2023, the Honorable Richard A. Jones approved of the parties' ESI
 6 Protocol in *Frame-Wilson*. Case No. 20-424, Dkt. # 91. The Protocol states

7 Pursuant to Fed. R. Evid. 502(d), the production of any documents in this
 8 proceeding shall not, for the purposes of this proceeding or any other federal or
 9 state proceeding, constitute a waiver by the producing party of any privilege
 10 applicable to those documents, including the attorney-client privilege, attorney
 work-product protection, or any other privilege or protection recognized by law.
 Information produced in discovery that is protected as privileged or work product
 shall be immediately returned to the producing party, and its production shall not
 constitute a waiver of such protection.

11 Case No. 20-424, Dkt. # 91 at 8.⁴

12 More than a year later, on July 29, 2024, this Court approved the parties' Amended
 13 Protective Order, which contains a section titled "**Inadvertent Production of Privileged or**
 14 **Otherwise Protected Material.**" Case No. 20-424, Dkt. # 179 at 17 (emphasis in original).⁵
 15 This section states,

16 When a Producing Party gives notice to Receiving Parties that certain inadvertently
 17 produced material is subject to a claim of privilege or other protection, the
 18 obligations of the Receiving Parties are those set forth in Federal Rule of Civil
 19 Procedure 26(b)(5)(B). This provision is not intended to modify whatever
 20 procedure may be established in an e-discovery order or agreement that provides
 for production without prior privilege review. This Order invokes the protections
 afforded by Fed. R. Evid. 502(b). As provided under Fed. R. Evid. 502(b) and

21 ³ In its March 11, 2025 letter, Amazon requested to claw back two documents that Plaintiffs
 selected for in camera review. Amazon said that it applied insufficient redactions to the documents. See
 Case No. 21-693, Dkt. # 292 (sealed); Case No. 20-424, Dkt. # 284 (sealed); Case No. 22-965, Dkt. # 162
 (sealed). The Court declined Amazon's request. See Case No. 21-693, Dkt. # 302 at 5–10; Case No. 20-
 424, Dkt. # 294 at 5–10; Case No. 22-965, Dkt. # 170 at 5–10.

22 ⁴ The ESI Protocols in *De Coster* and *Brown* contain identical provisions. See Case 21-693, Dkt.
 # 66 at 7–8; Case No. 22-695, Dkt. # 60 at 7–8.

23 ⁵ The Amended Protective Orders in *De Coster* and *Brown* contain identical provisions. Case No.
 24 21-693, Dkt. # 169 at 17; Case No. 22-965, Dkt. # 82 at 17–18.

1 502(d) and subject to the limitations in Fed. R. Evid. 502(a), the disclosure of
 2 privileged material in connection with this litigation does not operate as a waiver
 3 in this action or any other action by the Producing Party of any privilege applicable
 4 to those documents, including the attorney-client privilege, attorney work-product
 5 protection, or any other privilege or protection recognized by law.

6 *Id.*

7 The Amended Protective Order is more specific than the ESI Protocol and addresses the
 8 treatment of privileged documents “inadvertently” produced. The only restriction is that the
 9 provision does not modify “whatever procedure may be established in an e-discovery order or
 10 agreement that provides for production *without prior privilege review.*” *See id.* (emphasis
 11 added). Thus, the Amended Protective Order applies to documents that the producing party
 12 reviewed for privilege.

13 The three documents at issue were produced during Amazon’s months-long privilege re-
 14 view.⁶ Exhibit 68 (CAAGLit-AMZ_10780239) was fully withheld on April 13, 2024, and
 15 produced in full on January 28, 2025.⁷ Case No. 21-693, Dkt. # 298 at 3 ¶ 10; Case No. 20-424,
 16 Dkt. # 289 at 3 ¶ 10; Case No. 22-965, Dkt. # 167 at 3 ¶ 10. Exhibit 69 (CAAGLit-
 17 AMZ_03029869) was fully withheld on April 13, 2023, and produced in full on October 29,
 18 2024. Case No. 21-693, Dkt. # 298 at 2 ¶ 8; Case No. 20-424, Dkt. # 289 at 2 ¶ 8; Case No. 22-
 19 965, Dkt. # 167 at 2 ¶ 8. Exhibit 94 (CAAGLit-AMZ_10631781) was fully withheld on October

20 ⁶ In August 2024, Plaintiffs filed a Motion to Compel Production of Documents from Amazon’s
 21 Privilege Logs and For Appointment of a Special Master. Case No. 21-693, Dkt. # 189 (sealed); Case
 22 No. 20-424, Dkt. # 186 (sealed); Case No. 22-965, Dkt. # 89 (sealed). In response, Amazon stated that it
 23 was in the process of re-reviewing the challenged privilege log entries and would be completing its
 24 review by mid-October 2024. *See* Case No. 21-693, Dkt. # 203 at 14–15 (sealed); Case No. 20-424, Dkt.
 25 # 197 at 14–15 (sealed); Case No. 22-965, Dkt. # 103 at 14–15 (sealed). By November 2024, Amazon
 26 had yet to complete its privilege re-review. On January 31, 2025, the Court held a hearing in which
 27 Plaintiffs renewed their motion and the parties presented their arguments on the outstanding discovery
 28 issues to the Court. Case No. 21-693, Dkt. # 277; Case No. 20-424, Dkt. # 256; Case No. 22-965, Dkt. #
 29 148. The Court then ordered Amazon to complete its re-review of every document withheld as privileged
 30 and provide a final privilege log to Plaintiffs by February 25, 2025. *Id.*

31 ⁷ Six other copies of Exhibit 68 were also produced to Plaintiffs. *See* Case No. 21-693, Dkt. #
 32 298 at 3 ¶ 11; Case No. 20-424, Dkt. # 289 at 3 ¶ 11; Case No. 22-965, Dkt. # 167 at 3 ¶ 11.

1 20, 2023, and produced to Plaintiffs with redactions on October 28, 2024. Case No. 21-693, Dkt.
 2 # 298 at 3 ¶ 9; Case No. 20-424, Dkt. # 289 at 3¶ 9; Case No. 22-965, Dkt. # 167 at 3 ¶ 9. Thus,
 3 the Amended Protective Order applies to these documents.

4 B. The Protective Order & Rule 502(b)

5 In its March 25, 2025 Order, the Court determined that the parties' Protective Order did
 6 not "articulate the desire" to forgo the Rule 502(b) waiver analysis. *See* Case No. 21-693, Dkt. #
 7 302 at 7; Case No. 20-424, Dkt. # 294 at 7; Case No. 22-965, Dkt. # 170 at 7. The Court said
 8 that "[n]o reasonable reading of the [Amended Protective] Order supports Amazon's contention
 9 that it allows a party to claw back a document under any circumstances." *Id.*⁸ Thus, the Court
 10 applies the Rule 502(b) waiver standard to Amazon's claw back requests.

11 1. Rule 502(b) exception to waiver

12 As stated above, when a party discloses a privileged document, that "disclosure does not
 13 operate as a waiver" if "(1) the disclosure is inadvertent; (2) the holder of the privilege or
 14 protection took reasonable steps to prevent disclosure; and (3) the holder promptly took
 15 reasonable steps to rectify the error." Fed. R. of Evid. 502(b)(1) – (3). Each of the requirements
 16

17 ⁸Amazon disagrees with the Court's previous determination and says that the reference to Rule
 18 502(b) in the Amended Protective Order "was not meant to supplant the specific agreement following it
 19 that 'disclosure does not operate as a waiver.'" *See* Case No. 21-693, Dkt. # 315 at 4 n.3; Case No. 20-
 20 424, Dkt. # 304 at 4 n.3; Case No. 22-965, Dkt. # 180 at 4 n.3. But the Protective Order states, "This
 21 Order *invokes the protections afforded by Fed. R. Evid. 502(b).*" Case No. 21-693, Dkt. # 169 at 17; Case
 22 No. 20-424, Dkt. # 179 at 17; Case No. 22-965, Dkt. # 82 at 17–18. And the following sentence also
 23 invokes Rule 502(b). *Id.* ("*As provided under Fed. R. Evid. 502(b) and 502(d) and subject to the*
 24 *limitations in Fed. R. Evid. 502(a)...*").

21 In the case cited by Amazon, the district court stated, "it goes without saying that parties must
 22 adequately articulate the desire to supplant analysis under Rule 502(b) in any agreement under Rule
 23 502(d) or (e)." *Great-W. Life & Annuity Ins. Co. v. Am. Econ. Ins. Co.*, No. 2:11-CV-02082-APG, 2013
 24 WL 5332410, at *13 (D. Nev. Sept. 23, 2013). The court reasoned that "[a]n agreed protective order
 'should be given a reasonable or common sense interpretation in light of its purposes.'" *Id.* (quoting
Koninklijke Philips Electronics N.V. v. KXD Tech., Inc., No. 2:05-cv-01532-RLH-GWF, 2007 WL
 2407038 *2 (D. Nev. Aug. 16, 2007)). Here, a reasonable reading of the Protective Order is that Rule
 502(b) applies given the explicit invocation of the "protections afforded by Rule 502(b)."

1 of Rule 502(b) is “separate and should not be conflated in the analysis[.]” *Datel Holdings Ltd. V.*
 2 *Microsoft Corp.*, No. C-09-05535 EDL, 2011 WL 866993, at *2 (N.D. Cal. Mar. 11, 2011).
 3 “The disclosing party has the burden of proving that the elements of the rule have been met.”
 4 *Columbia Cnty. Credit Union v. Chicago Title Ins. Co.*, No. C09-5290RJB, 2009 WL 10688219,
 5 at *4 (W.D. Wash. Dec. 22, 2009).

6 Amazon contends that the disclosure was “inadvertent” given that its privilege re-review
 7 “was enormous and exceedingly difficult.” Case No. 21-693, Dkt. # 296 at 13; Case No. 20-424,
 8 Dkt. # 287 at 13; Case No. 22-965, Dkt. # 165 at 13. Amazon says that its disclosure of Exhibit
 9 68 was inadvertent because “[t]he document was not reviewed seven times by seven different
 10 reviewers; rather a single reviewer could review a document and make a mistake, and that
 11 mistake would be replicated across other versions of the same document based on consistency
 12 review.” Case No. 21-693, Dkt. # 296 at 13–14; Case No. 20-424, Dkt. # 287 at 13–14; Case
 13 No. 22-965, Dkt. # 165 at 13–14 (internal citation omitted). As to Exhibits 69 and 94, Amazon
 14 asserts that “[t]he fact that a small number of documents were mistakenly downgraded to not
 15 privileged or downgraded to redacted, even though they were initially and correctly denoted as
 16 fully privileged, only establishes that a reviewer made a mistake in reviewing complex, dense,
 17 single-spaced documents day in and day out—not intentionality.” Case No. 21-693, Dkt. # 296
 18 at 14; Case No. 20-424, Dkt. # 287 at 14; Case No. 22-965, Dkt. # 165 at 14 (internal citation
 19 omitted). Amazon says that the declaration of its discovery counsel, Robert Keeling, “set[s]
 20 forth the circumstances surrounding the production of each of the three documents, and why the
 21 production of each was inadvertent.” Case No. 21-693, Dkt. # 296 at 14; Case No. 20-424, Dkt.
 22 # 287 at 14; Case No. 22-965, Dkt. # 165 at 14.

23 Plaintiffs respond that “the Keeling Declaration includes only *conclusory assertions* that
 24 are completely at odds with Amazon’s representations that it reviewed each document word-by-

1 word, employed sophisticated quality control measures, and conducted investigations to make
2 privilege determinations.” Case No. 21-693, Dkt. # 311 (sealed) at 11; Case No. 20-424, Dkt. #
3 300 (sealed) at 11; Case No. 22-965, Dkt. # 176 (sealed) at 11 (emphasis in original). They say
4 that Amazon does not mention “any technical glitches or other extraordinary facts to suggest the
5 documents were produced *by accident*.” Case No. 21-693, Dkt. # 311 (sealed) at 12; Case No.
6 20-424, Dkt. # 300 (sealed) at 12; Case No. 22-965, Dkt. # 176 (sealed) at 12 (emphasis in
7 original). As for Exhibits 68 and 69, Plaintiffs say that no fact suggests that the production of
8 these documents was anything but a judgment call. Case No. 21-693, Dkt. # 311 (sealed) at 12;
9 Case No. 20-424, Dkt. # 300 (sealed) at 12; Case No. 22-965, Dkt. # 176 (sealed) at 12. As for
10 Exhibit 94, they say that there is no evidence that the redactions were mistakenly applied. Case
11 No. 21-693, Dkt. # 311 (sealed) at 12; Case No. 20-424, Dkt. # 300 (sealed) at 12; Case No. 22-
12 965, Dkt. # 176 (sealed) at 12. As for the duplicates of Exhibit 68, Plaintiffs say that Amazon
13 does not explain how the “master” coded document was “inadvertently miscoded.” Case No. 21-
14 693, Dkt. # 311 (sealed) at 12; Case No. 20-424, Dkt. # 300 (sealed) at 12; Case No. 22-965,
15 Dkt. # 176 (sealed) at 12. They say that Amazon reviewed multiple copies “*specifically* to make
16 a privilege determination and *intentionally* marked the documents for production over several
17 months.” Case No. 21-693, Dkt. # 311 (sealed) at 12–13; Case No. 20-424, Dkt. # 300 (sealed)
18 at 12–13; Case No. 22-965, Dkt. # 176 (sealed) at 12–13 (emphasis in original).

19 While Rule 502(b) does not define “inadvertent,” other courts have developed two
20 approaches to the issue. *See T&W Holding Co., LLC v. City of Kemah, Texas*, 641 F. Supp. 3d
21 378, 382 (S.D. Tex. 2022); *Thermoset Corp. v. Bldg. Materials Corp. of Am.*, No. 14-60268-
22 CIV, 2015 WL 1565310, at *8 (S.D. Fla. Apr. 8, 2015). Under the first approach, a court simply
23 looks to “whether the party intended a privileged or work-product protected document to be
24 produced or whether the production was a mistake.” *T&W Holding Co., LLC*, 641 F. Supp. 3d

1 at 382. Previously, this Court adopted the first approach. *See* Case No. 21-693, Dkt. # 302 at 9;
 2 Case No. 20-424, Dkt. # 294 at 9; Case No. 22-965, Dkt. # 170 at 9 (“The Court adopts [the first]
 3 approach because it aligns with other courts in the Circuit as well as the structure and purpose of
 4 Rule 502(b).”); *see also F.T.C. v. Amazon.com, Inc.*, No. 2:23-CV-00932-JHC, 2024 WL
 5 3620467, at *6 (W.D. Wash. Aug. 1, 2024) (same).⁹

6 Amazon’s production of the documents at issue was intentional. For context, during the
 7 January 31, 2025 hearing, Amazon represented to the Court that 80 lawyers have been working
 8 on this privilege re-review and “[t]hey have put in 14,000 hours.” Case No. 21-693, Dkt. # 279
 9 (sealed) at 27:13–17; Case No. 20-424, Dkt. # 258 (sealed) at 27: 13–17; Case No. 22-965, Dkt.
 10 # 149 (sealed) at 27:13–17. The company also said, “These documents have been individually
 11 re-reviewed. Sometimes that requires many meetings to figure out the context of the document,
 12 especially with dual-purpose documents.” Case No. 21-693, Dkt. # 279 (sealed) at 27:13–17;
 13 Case No. 20-424, Dkt. # 258 (sealed) at 27: 13–17; Case No. 22-965, Dkt. # 149 (sealed) at
 14 27:13–17. In its March 11, 2025 letter to the Court, Amazon stated

15 Over 200 lawyers, including outside counsel from five law firms, participated in
 16 the re-review in various roles—including first-level re-review, quality control and
 17 consistency, and privilege logging—which covered nearly 140,000 privilege log
 18 entries across bespoke privilege logs prepared in other contexts. Amazon’s review
 19 included a document’s full family, other branches of an email chain, and related
 20 background. Amazon also biased in favor of redacting portions of a document
 21 instead of fully withholding documents, as noted above—a more time-consuming
 22 process.

23 Case No. 21-693, Dkt. # 292 (sealed) at 8; Case No. 20-424, Dkt. # 284 (sealed) at 8; Case
 24 No. 22-965, Dkt. # 162 (sealed) at 8.

9 Under the second approach, the court looks at factors along with a party’s subjective intent, “including the total number of documents reviewed, the procedures used to review the documents before production, and the actions of the producing party after discovering that the documents had been produced.” *See T&W Holding Co., LLC*, 641 F. Supp. 3d at 382.

Amazon downgraded the documents during this comprehensive re-review of its privilege logs. Case No. 21-693, Dkt. # 298 at 2–3 ¶¶ 8–10; Case No. 20-424, Dkt. # 289 at 2–3 ¶¶ 8–10; Case No. 22-965, Dkt. # 167 at 2–3 ¶¶ 8–10. And Amazon does not explain how the production of these documents was a mistake. For example, with respect to Exhibit 94, Keeling’s declaration simply says that the document was “inadvertently downgraded” to “privilege redact” a year after it was originally withheld in full. Case No. 21-693, Dkt. # 298 at 3 ¶ 9; Case No. 20-424, Dkt. # 289 at 3 ¶ 9; Case No. 22-965, Dkt. # 167 at 3 ¶ 9; *see also* Case No. 21-693, Dkt. # 296 at 14; Case No. 20-424, Dkt. # 287 at 14; Case No. 22-965, Dkt. # 165 at 14 (Amazon’s motion generally describes “a small number of documents [that] were mistakenly downgraded to not privileged or downgraded to redacted...”).¹⁰

As the Court stated previously, “When a party makes a strategic decision that it later regrets, such as redacting a document rather than withholding it completely as privileged, it cannot later claim inadvertence to shield itself from the consequences of its own judgment call.” See Case No. 21-693, Dkt. # 302 at 9–10; Case No. 20-424, Dkt. # 294 at 9–10; Case No. 22-965, Dkt. # 170 at 9–10 (quoting *F.T.C. v. Amazon.com, Inc.*, 2024 WL 3620467, at *6); see also *New Mexico Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs.*, No. CV 12-526 MV/GBW, 2017 WL 10606787, at *10 (D.N.M. Feb. 17, 2017), report and recommendation adopted. No. 1:12-CV-00526-MV/GBW, 2017 WL 10606786 (D.N.M. Feb. 17,

¹⁰ The Court notes that these documents were downgraded and produced to Plaintiffs *before* Amazon produced its final privilege logs on February 25, 2025, and February 28, 2025. Case No. 21-693, Dkt. # 312 (sealed) at 5–6 ¶¶ 11, 17, 20; Case No. 20-424, Dkt. # 301 (sealed) at 5–6 ¶¶ 11, 17, 20; Case No. 22-965, Dkt. # 177 (sealed) at 5–6 ¶¶ 11, 17, 20. For example, Exhibit 64 was originally logged as wholly privileged on October 20, 2023, and later downgraded to privilege redact on October 28, 2024. Case No. 21-693, Dkt. # 298 at 3 ¶ 9; Case No. 20-424, Dkt. # 289 at 3 ¶ 9; Case No. 22-965, Dkt. # 167 at 3 ¶ 9. These documents remained logged as downgraded in Amazon’s final logs produced on February 25, 2025, and February 28, 2025. Case No. 21-693, Dkt. # 312 (sealed) at 5–6 ¶¶ 11, 17, 20; Case No. 20-424, Dkt. # 301 (sealed) at 5–6 ¶¶ 11, 17, 20; Case No. 22-965, Dkt. # 177 (sealed) at 5–6 ¶¶ 11, 17, 20.

1 2017) (reasoning that the defendant's production of documents was not inadvertent when the
 2 defendant repeatedly represented to the court that it "carefully reviewed each document" and
 3 employed multiple levels of privilege review before logging the documents) (internal quotation
 4 omitted).

5 Amazon cites *Epic Games, Inc. v. Apple Inc.*, to support its contention that the disclosure
 6 of the documents was inadvertent. Case No. 20-cv-05640-YGR (TSH), 2025 U.S. Dist. LEXIS
 7 34007, *12 (N.D. Cal. Feb. 25, 2025). In *Epic Games*, the court allowed Apple to claw back
 8 several documents that it had re-reviewed for privilege and produced with redactions. *Id.* at *13.
 9 According to Apple, these documents were substantially similar to a document that the Special
 10 Master in that case found to be privileged. *Id.* at *10. The court appears to have adopted the
 11 second approach to inadvertence—i.e., the court looked at Apple's subjective intent, "including
 12 the total number of documents reviewed, the procedures used to review the documents before
 13 production, and the actions of the producing party after discovering that the documents had been
 14 produced." *See T&W Holding Co., LLC*, 641 F. Supp. 3d at 382. The court flagged that "Apple
 15 used a large team of reviewers to make privilege calls on a large number of documents[.]" *Epic*
 16 *Games, Inc.*, 2025 U.S. Dist. LEXIS 34007, *13. In that case, Apple had re-reviewed 54,000
 17 thousand documents within "a few weeks." *Id.* at *11. By contrast, Amazon re-reviewed about
 18 100,000 documents over an eight-month period.

19 Thus, the Court does not conclude that the production of Exhibit 68 (and the six duplicate
 20 copies), Exhibit 69, and Exhibit 94 was inadvertent.¹¹

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 23 ¹¹ Because Amazon has failed to meet its burden for one of the requirements under Rule 502(b),
 24 the Court need not address the other two elements. *See* Case No. 21-693, Dkt. # 302 at 10 n.5; Case No.
 20-424, Dkt. # 294 at 10 n.5; Case No. 22-965, Dkt. # 10 n.5 (citing *Maxtena, Inc. v. Marks*, 289 F.R.D.
 427, 446 (D. Md. 2012) ("Because Maxtena has failed to meet its burden with respect to at least one of
 the required elements of Rule 502(b), there is no need to address the other two prongs.").

1 **IV**

2 **CONCLUSION**

3 For these reasons, the Court DENIES Amazon's motion.

4 Dated this 29th day of April, 2025.

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7 John H. Chun
8 United States District Judge

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